

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

GONZALO VILLALOBOS,

Petitioner,

2:14-cv-02029-RFB-GWF

vs.

ORDER

BRIAN WILLIAMS, *et al.*,

Respondents.

Introduction

In this habeas corpus action, brought by Nevada prisoner Gonzalo Villalobos, the respondents have filed a motion to dismiss Villalobos' first amended petition for writ of habeas corpus. The Court will grant respondents' motion to dismiss and dismiss this action on the grounds that all the claims in Villalobos' first amended petition are barred by the statute of limitations, and, in addition, his fourth claim is procedurally defaulted.

Background

22 On September 6, 2015, following a jury trial, Villalobos was convicted in Nevada's Eighth
23 Judicial District Court, in Clark County, Nevada, of one count of second degree murder with use
24 of a deadly weapon, four counts of attempted murder with use of a deadly weapon, and five counts
25 of discharging a firearm out of a motor vehicle. *See* Judgment of Conviction, Exhibit 52 (ECF No.
26 10-2). Villalobos was sentenced as follows:

1	Count 1	second degree murder with use of a deadly weapon	two consecutive sentences of 10 years to life, consecutive to all other sentences
2	Count 2	attempted murder with use of a deadly weapon	two consecutive sentences of 2 to 5 years
3	Count 4	attempted murder with use of a deadly weapon	two consecutive sentences of 2 to 5 years, consecutive to the sentence on Count 2
4	Count 6	attempted murder with use of a deadly weapon	two consecutive sentences of 2 to 5 years, concurrent with the sentence on Count 4
5	Count 8	attempted murder with use of a deadly weapon	two consecutive sentences of 2 to 5 years, concurrent with the sentences on Counts 4 and 6
6	Count 10	discharging firearm out of a motor vehicle	a sentence of 2 to 5 years, concurrent with the sentences on counts 4, 6 and 8
7	Count 11	discharging firearm out of a motor vehicle	a sentence of 2 to 5 years, concurrent with the sentences on counts 4, 6 and 8
8	Count 12	discharging firearm out of a motor vehicle	a sentence of 2 to 5 years, concurrent with the sentences on counts 4, 6 and 8
9	Count 13	discharging firearm out of a motor vehicle	a sentence of 2 to 5 years, concurrent with the sentences on counts 4, 6 and 8
10	Count 14	discharging firearm out of a motor vehicle	a sentence of 2 to 5 years, concurrent with the sentences on counts 4, 6 and 8
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21 *See id.*

22 Villalobos appealed. *See* Notice of Appeal, Exhibit 53 (ECF No. 10-3). On May 29, 2009,
 23 the Nevada Supreme Court affirmed. Order of Affirmance, Exhibit 91 (ECF No. 11-15). The
 24 Nevada Supreme Court denied rehearing and entered judgment on July 31, 2009. Clerk's Certificate,
 25 Exhibit 92 (ECF No. 11-16); Order Denying Rehearing, Exhibit 95 (ECF No. 11-19). The remittitur
 26 was issued on August 28, 2009. Remittitur, Exhibit 96 (ECF No. 11-20).

1 Villalobos filed a petition for writ of habeas corpus in state court on March 1, 2013. *See*
2 Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 97 (ECF No. 11-21); Memorandum in
3 Support of Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 98 (ECF No. 11-22). In a
4 written order filed on June 5, 2013, the state district court denied Villalobos' petition on the ground
5 that it was barred by the statute of limitations. Findings of Fact, Conclusions of Law and Order,
6 Exhibit 104 (ECF No. 12-2). Villalobos appealed. Notice of Appeal, Exhibit 105 (ECF No. 12-3).
7 The Nevada Supreme Court affirmed the denial of the petition on statute of limitations grounds on
8 September 16, 2014. Order of Affirmance, Exhibit 114 (ECF No. 12-12). The remittitur was issued
9 on October 13, 2014. Remittitur, Exhibit 115 (ECF No. 12-13).

10 This Court received Villalobos' original *pro se* federal habeas corpus petition for filing on
11 December 4, 2014. *See* Petition for Writ of Habeas Corpus (ECF No. 5). Villalobos alleges that he
12 mailed the petition to the Court for filing on November 26, 2014. *Id.* at 1.

13 Respondents filed a motion to dismiss on August 12, 2015 (ECF No. 7). After the parties
14 briefed that motion, the Court *sua sponte* appointed counsel for petitioner. *See* Order entered
15 March 31, 2016 (ECF No. 16). The motion to dismiss Villalobos' original petition was denied,
16 without prejudice, as moot. *See id.*

17 Counsel -- the Federal Public Defender for the District of Nevada (FPD) -- appeared for
18 Villalobos on April 14, 2016 (ECF No. 17). With counsel, Villalobos filed a first amended petition
19 on February 10, 2017 (ECF No. 24). The first amended petition asserts four claims for relief:

20 Claim 1 - The trial court admitted evidence of extraneous bad acts in
21 violation of Villalobos's right to a fair trial, right of
22 confrontation, and due process as guaranteed by the Fifth,
 Sixth, and Fourteenth Amendments of the United States
 Constitution.

1 Claim 4 - Villalobos was denied the effective assistance of appellate
2 counsel as guaranteed by the Sixth and Fourteenth
 Amendments to the United States Constitution.

3 First Amended Petition (ECF No. 24).

4 Respondents filed a motion to dismiss the first amended petition on March 10, 2017 (ECF
5 No. 26). Villalobos filed an opposition to that motion on May 31, 2017 (ECF No. 31), and
6 respondents replied on August 28, 2017 (ECF No. 37).

7 On August 31, 2017, Villalobos filed a motion (ECF No. 38) requesting leave of court to file
8 a supplemental exhibit in support of his opposition to the motion to dismiss. Respondents filed a
9 response to that motion (ECF No. 39) and Villalobos replied (ECF No. 40). The Court granted that
10 motion on September 12, 2017, ordering that the Court will consider the supplemental exhibit
11 (ECF No. 38-1), as well as the arguments of the parties in their briefing of this matter (ECF Nos. 38,
12 39, 40), with regard to the motion to dismiss.

13 The motion to dismiss is, therefore, fully briefed and before the Court for resolution.

14 **Discussion**

15 **Statute of Limitations**

16 The Antiterrorism and Effective Death Penalty Act (AEDPA), enacted in 1996, included a
17 one-year statute of limitations for federal habeas petitions challenging state convictions or sentences:

18 (1) A 1-year period of limitation shall apply to an application for a writ of habeas
 corpus by a person in custody pursuant to the judgment of a State court. The
19 limitation period shall run from the latest of --

20 (A) the date on which the judgment became final by the conclusion of
 direct review or the expiration of the time for seeking such review;

21 (B) the date on which the impediment to filing an application created
 by State action in violation of the Constitution or laws of the United
22 States is removed, if the applicant was prevented from filing by such
 State action;

23 © the date on which the constitutional right asserted was initially
 recognized by the Supreme Court, if the right has been newly
24 recognized by the Supreme Court and made retroactively applicable to
 cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

3 28 U.S.C. 2244(d)(1). Respondents contend, in their motion to dismiss, that Villalobos' entire first
4 amended petition is barred by the statute of limitations.

5 Villalobos' direct appeal concluded on July 31, 2009, when the Nevada Supreme Court
6 denied his petition for rehearing and entered judgment affirming his conviction. *See Clerk's*
7 *Certificate, Exhibit 92 (ECF No. 11-16); Order Denying Rehearing, Exhibit 95 (ECF No. 11-19).*
8 Adding the ninety days within which a petition for a writ of certiorari could have been filed
9 (*see Supreme Court Rule 13*), the date on which Villalobos' conviction became final, for purposes of
10 the AEDPA statute of limitations, was October 29, 2009. Running from that date, without any
11 tolling, the one-year limitations period would have expired on October 29, 2010. *See Opposition to*
12 *Motion to Dismiss (ECF No. 31), p. 2 ("Villalobos agrees with Williams that he had one year to file*
13 *a federal habeas petition, beginning October 29, 2009, the day his conviction became final.").*

14 Villalobos did not file his state habeas petition until March 1, 2013. *See Petition for Writ of*
15 *Habeas Corpus (Post-Conviction)*, Exhibit 97 (ECF No. 11-21); *Memorandum in Support of Petition*
16 *for Writ of Habeas Corpus (Post-Conviction)*, Exhibit 98 (ECF No. 11-22). The Nevada Supreme
17 Court ruled that Villalobos' state habeas action was barred by the state-law statute of limitations.
18 *See Order of Affirmance*, Exhibit 114 (ECF No. 12-12). An untimely state post-conviction petition
19 is not considered "properly filed," and does not afford the petitioner statutory tolling of the AEDPA
20 statute of limitations. *See 28 U.S.C. § 2244(d)(2); Pace v. DiGuglielmo*, 544 U.S. 408, 414 (2005).
21 Therefore, during the time that Villalobos litigated his state habeas petition, between March 1, 2013,
22 and October 13, 2014, the AEDPA limitations period continued to run.

23 Villalobos mailed his federal habeas petition to this Court for filing on November 26, 2014.
24 Therefore, more than five years passed, after his conviction was final, before Villalobos initiated this
25 action. Then, Villalobos' first amended habeas petition was not filed until February 10, 2017, more
26 than two years after his original petition was filed.

1 A habeas corpus petitioner is entitled to equitable tolling of the AEDPA statute of limitations
2 if the petitioner shows: ““(1) that he has been pursuing his rights diligently, and (2) that some
3 extraordinary circumstance stood in his way’ and prevented timely filing.” *Holland v. Florida*, 560
4 U.S. 631, 649 (2010) (quoting *Pace*, 544 U.S. at 418).

5 In his opposition to the motion to dismiss, Villalobos argues that he is entitled to equitable
6 tolling from the date his conviction became final (October 29, 2009) until December 18, 2012,
7 because the attorney who represented him on his direct appeal to the Nevada Supreme Court did not
8 inform him about the ruling on that appeal. *See* Opposition to Motion to Dismiss, pp. 4-8.

9 Villalobos argues that his direct appeal attorney abandoned him, and that equitable tolling is
10 therefore warranted under *Holland*, as well as *Maples v. Thomas*, 565 U.S. 266 (2012), and *Gibbs v.*
11 *LeGrand*, 767 F.3d 879 (9th Cir. 2014). The Court determines that the question whether such
12 equitable tolling is warranted turns on questions of fact. However, for purposes of this motion to
13 dismiss, the Court need not resolve those factual issues. For purposes of the analysis of this motion
14 -- and without expressing any opinion with respect to the resolution of any factual question upon
15 which such tolling would depend -- the Court assumes that equitable tolling from October 29, 2009,
16 to December 18, 2012, is warranted. Making this assumption, the limitations period for Villalobos’
17 federal petition expired on December 18, 2013, absent any further tolling.

18 Villalobos goes on to argue that he is entitled to equitable tolling from December 18, 2012,
19 until November 26, 2014, the date on which he mailed his original petition to this Court. *See*
20 Opposition to Motion to Dismiss, pp. 8-12. Villalobos argues that equitable tolling is warranted
21 during this period because he speaks and writes only Spanish, because he has little education, and
22 because of the conditions of his confinement at Nevada’s Southern Desert Correctional Center
23 (SDCC), which, he claims, resulted in inadequate access to the prison law library, a lack of Spanish-
24 language materials in the law library, and inadequate assistance by Spanish-speaking law clerks.
25 *See id.* Villalobos does not set forth a colorable argument that he is entitled to equitable tolling
26 during this period.

1 Villalobos' claims regarding his language barrier, lack of education, and access to legal
2 materials and assistance at SDCC, are general and conclusory; he does not make any specific claim
3 about how those factors prevented him from initiating this case earlier.

4 Moreover, Villalobos' argument that he could not initiate this action between December 18,
5 2012, and November 26, 2014, because of his minimal education, the language barrier, and the
6 conditions at SDCC, is belied by the record. Villalobos was able to file a habeas petition, along with
7 a memorandum in support of the petition, in state court, on March 1, 2013. *See Petition for Writ of*
8 *Habeas Corpus (Post-Conviction)*, Exhibit 97 (ECF No. 11-21); *Memorandum in Support of Petition*
9 *for Writ of Habeas Corpus (Post-Conviction)*, Exhibit 98 (ECF No. 11-22). On that date, Villalobos
10 also filed a "Motion to Withdraw Counsel" in state court. *See Motion to Withdraw Counsel*, Exhibit
11 99 (ECF No. 11-23). On April 18, 2013, after the State responded to his state-court habeas petition,
12 Villalobos filed a reply to that response. *See Petitioner's Reply to State's Response*, Exhibit 102
13 (ECF No. 12). Then, after the state district court denied his petition, Villalobos initiated and
14 litigated an appeal to the Nevada Supreme Court. Villalobos filed a notice of appeal and designation
15 of record on appeal on June 7, 2013. *See Notice of Appeal*, Exhibit 105 (ECF No. 12-3);
16 *Designation of Record on Appeal*, Exhibit 106 (ECF No. 12-4). So, the record demonstrates plainly
17 that, contrary to his argument for equitable tolling, Villalobos was not prevented by his minimal
18 education, the language barrier, or conditions at SDCC, from pursuing a habeas action to completion
19 in the state district court and supreme court in 2013.

20 Villalobos has not established any grounds for tolling of the AEDPA limitations period after
21 December 18, 2012; the limitations period expired on December 18, 2013.

22 Furthermore, Villalobos makes no argument that he is entitled to equitable tolling, or tolling
23 of any kind, between November 26, 2014, when he mailed his original petition to this Court, and
24 February 10, 2017, when he filed his first amended petition. That was a period of more than two
25 years, itself in excess of the one-year limitations period. The pendency of a federal habeas corpus
26 action does not toll the AEDPA statute of limitations. *Duncan v. Walker*, 533 U.S. 167, 181 (2001).

1 In *Mayle v. Felix*, 545 U.S. 644 (2005), the Supreme Court held that “[s]o long as the original
2 and amended petitions state claims that are tied to a common core of operative facts, relation back
3 will be in order,” but that “[a]n amended habeas petition ... does not relate back (and thereby escape
4 AEDPA’s one-year time limit) when it asserts a new ground for relief supported by facts that differ
5 in both time and type from those the original pleading set forth.” *Mayle*, 545 U.S. at 650, 664.
6 Comparing Villalobos’ original and first amended petitions, Claims 1, 2 and 3 of his amended
7 petition do not share a common core of operative fact with any claim in his original petition, and,
8 therefore, do not relate back to the filing of his original petition. Even if the original petition was
9 timely filed -- and the Court finds that it was not -- those three claims would still be time-barred as a
10 result of the passage of time between the filing of the original petition and the first amended petition.

11 This action is, therefore, barred by the statute of limitations. Respondents’ motion to dismiss
12 will be granted, and this action dismissed on that ground.

13 Procedural Default

14 In addition, respondents contend that Claim 4 of Villalobos’ first amended petition is
15 procedurally defaulted, and Villalobos has proffered no argument in response.

16 In *Coleman v. Thompson*, the Supreme Court held that a state prisoner who fails to comply
17 with the state’s procedural requirements in presenting his claims is barred by the adequate and
18 independent state ground doctrine from obtaining a writ of habeas corpus in federal court. *Coleman*
19 *v. Thompson*, 501 U.S. 722, 731-32 (1991) (“Just as in those cases in which a state prisoner fails to
20 exhaust state remedies, a habeas petitioner who has failed to meet the State’s procedural
21 requirements for presenting his federal claims has deprived the state courts of an opportunity to
22 address those claims in the first instance.”). Where such a procedural default constitutes an adequate
23 and independent state ground for denial of habeas corpus, the default may be excused only if “a
24 constitutional violation has probably resulted in the conviction of one who is actually innocent,” or if
25 the prisoner demonstrates cause for the default and prejudice resulting from it. *Murray v. Carrier*,
26 477 U.S. 478, 496 (1986).

1 To demonstrate cause for a procedural default, the petitioner must “show that some objective
2 factor external to the defense impeded” his efforts to comply with the state procedural rule. *Murray*,
3 477 U.S. at 488. For cause to exist, the external impediment must have prevented the petitioner
4 from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991). With respect to the
5 prejudice prong, the petitioner bears “the burden of showing not merely that the errors [complained
6 of] constituted a possibility of prejudice, but that they worked to his actual and substantial
7 disadvantage, infecting his entire [proceeding] with errors of constitutional dimension.” *White v.*
8 *Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) (citing *United States v. Frady*, 456 U.S. 152, 170 (1982)).

9 In Claim 4, Villalobos claims that he was denied effective assistance of his appellate counsel
10 on his direct appeal, primarily because his counsel did not adequately communicate with him. *See*
11 First Amended Petition, pp. 14-15. Villalobos raised this claim in his state habeas action. *See*
12 Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 97 (ECF No. 11-21); Memorandum
13 in Support of Petition for Writ of Habeas Corpus (Post-Conviction), Exhibit 98 (ECF No. 11-22).
14 The state district court denied that petition on the ground that it was barred by the state-law statute of
15 limitations, and the Nevada Supreme Court affirmed, ruling that the petition was time-barred and
16 that Villalobos did not show good cause to overcome the procedural bar. *See* Findings of Fact,
17 Conclusions of Law and Order, Exhibit 104 (ECF No. 12-2); Order of Affirmance, Exhibit 114
18 (ECF No. 12-12). Claim 4, then, is subject to dismissal on the ground of procedural default, and
19 Villalobos does not make any argument that Claim 4 is not procedurally defaulted or that he can
20 overcome the procedural default. *See* Opposition to Motion to Dismiss. Claim 4 is subject to
21 dismissal on this additional ground.

22 Respondents’ Other Arguments

23 As the Court rules that all of Villalobos’ claims are barred by the statute of limitations, and
24 that Claim 4 is procedurally defaulted, the Court need not reach, and declines to reach, the other
25 arguments asserted by respondents (the question of the exhaustion in state court of Claims 1 and 2).

26

1 Certificate of Appealability

2 The standard for issuance of a certificate of appealability is governed by 28 U.S.C. § 2253(c).

3 The Supreme Court has interpreted section 2253(c) as follows:

4 Where a district court has rejected the constitutional claims on the merits, the
5 showing required to satisfy § 2253(c) is straightforward: The petitioner must
6 demonstrate that reasonable jurists would find the district court's assessment of the
7 constitutional claims debatable or wrong. The issue becomes somewhat more
8 complicated where, as here, the district court dismisses the petition based on
9 procedural grounds. We hold as follows: When the district court denies a habeas
petition on procedural grounds without reaching the prisoner's underlying
constitutional claim, a COA should issue when the prisoner shows, at least, that
jurists of reason would find it debatable whether the petition states a valid claim of
the denial of a constitutional right and that jurists of reason would find it debatable
whether the district court was correct in its procedural ruling.

10 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also James v. Giles*, 221 F.3d 1074, 1077-79 (9th
11 Cir. 2000). Applying this standard, the Court finds that a certificate of appealability is not
12 warranted.

13 **IT IS THEREFORE ORDERED** that respondents' Motion to Dismiss First-Amended
14 Petition (ECF No. 26) is **GRANTED**. This action is dismissed.

15 **IT IS FURTHER ORDERED** that petitioner is denied a certificate of appealability.

16 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment accordingly.

18 DATED this 28th day of December, 2017.

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RICHARD F. BOULWARE, II
UNITED STATES DISTRICT JUDGE

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